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In The

Supreme Court of the United States

October Term, 1937.

No.

HARRY FLEISHER, SAM FLEISHER and JOSEPH STEIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully show:

I. Summary Statement Of the Matter Involved.

(Figures in parenthesis refer to pages of the printed record, except as the context clearly indicates otherwise.)

On October 30, 1935, the petitioners herein, and others, were jointly indicted in a conspiracy indictment contain-

ing four counts (1). The first count of the indictment charges that the defendants did conspire to cause to be set up stills and distilling apparatus for the production of distilled spirits, without having the same registered with the Collector of Internal Revenue (2). As overt acts under this count the indictment sets forth that Jack Selbin superintended the unloading and loading of a large quantity of sugar at the Guardian Transit Company in the city of Detroit, on, to-wit, the 10th day of April, 1935, and that Joseph Stein unloaded a large quantity of sugar at the Guardian Transit Company on, to-wit, the 11th day of April, 1935 (2, 3, 31).

The second count charges the appellants and other persons with conspiring to unlawfully, knowingly, wilfully and feloniously making and fermenting and causing to be made and fermented a large quantity of mash, wort and/or wash. As overt acts under this count, the indictment sets forth that the defendant, Joseph Stein, on the 10th day of April, 1935, drove an Indiana truck, heavily laden, from the Guardian Transit Company in the city of Detroit, to the Federal Warehouse in the city of Detroit (4, 31). The indictment sets forth another overt act under this count to the effect that the defendant, Jack Selbin, did on the 10th day of April, 1935, back a Ford V-8 coupe and enter the premises of the Federal Warehouse in the city of Detroit. It is set up as a further overt act under this count, that the defendant, Harry Fleisher, did on the 11th day of April, 1935, drive a Ford car to a point opposite of the front entrance of a garage at 4029 Milford Street, Detroit, Michigan (4, 31). It sets forth another overt act that the defendant, John J. Gettleson, did on or about the first of December, 1935, lease and pay the first month's rent for a portion of the premises known as the Federal Warehouse located in

Detroit, Michigan (4, 31). It sets forth another overt act under this count to the effect that the defendant, Harry Fleisher, did on or about the 1st of December, 1935, accompany defendant, John J. Gettleson, to the Federal Warehouse (5, 31).

The third count of the indictment charges the appellants, and others, with conspiring to carry on the business of distillers without having given bond as required by law, and with the intent on the part of appellants to co-conspire to defraud the Government of the tax on spirits which would be distilled by the said appellants and co-conspirators (5, 31, 32). As overt acts in furtherance of this count the following is set forth: That defendants, Jack Mankin and Harry Schonowsky on the 11th day of April, 1935, climbed through a small hole in the west wall of the premises known as the Federal Warehouse. It sets forth another overt act, that on the 10th day of April, 1935, Joseph Stein drove an Indiana truck from the American Can Company to the garage at 4029 Milford Street (6, 32).

The fourth count in the indictment sets forth that the appellants, and others unlawfully conspired to possess a large quantity of distilled spirits, the immediate containers not having affixed thereto a stamp or stamps denoting the quantity of distilled spirits contained therein and evidencing payment of the Internal Revenue Tax imposed on the said spirits (6, 7, 32). The overt acts relied on under this count set forth as follows: That on the 8th day of April, 1935, the defendant, Sam Fleisher, transported sugar from a point in Cleveland, Ohio, to the Federal Warehouse in Detroit, Michigan (7, 32). It sets forth another overt act, that during the late fall of 1934 or during the first part of 1935, Sam Wisotsky, constructed

a cement block partition in the Federal Warehouse (7, 32).

The 31st day of March, A. D. 1936, the defendants were tried before the Honorable Arthur F. Lederle, United States District Judge for the Eastern District of Michigan, Southern Division, and a jury (32). During the progress of the trial the defendants moved to consolidate the four counts in the indictment into one count, claiming that the four counts constitute but one crime and but one conspiracy. The trial court denied this motion and exception was taken (32).

The appellants, Harry Fleisher, Sam Fleisher, Joseph Stein and Jack Selbin, appealed this cause to the Circuit Court of Appeals for the Sixth Judicial Circuit, and in their assignments of error have set forth that the trial court erred in sentencing to imprisonment and fining each of the defendants on each of the four separate counts of the indictment, and compelling them to serve these sentences consecutively, for the reason that the four separate sentences thus to be served constituted excessive punishment in violation of the United States Constitution, for the reason that the four counts in the indictment constitute but one crime and one conspiracy, and that count three comprises counts one, two and four as component elements thereof.

On June 3, 1937, the Circuit Court of Appeals sustained the judgment of the District Court (41, 43, 45), saying:

> "A single act may be an offense against two statutes, and if each statute requires proof of some fact which the other does not, an acquittal or conviction upon either statute does not exempt the accused from prosecution and punishment under the other. *Block-*

burger v. United States, 284 U. S. 299, 304. In that case the question was whether the same act, namely, a sale of narcotics, constituted two offenses: (1) that of selling the forbidden drugs except in or from the original stamped package, and (2) that of selling any such drugs not in pursuance of a written order of the person to whom the sale was made. It was held that although there was but one sale, two offenses were committed, and that the test to be applied to determine whether there are two offenses or only one is whether conviction for each offense requires proof of a fact which the other does not. Here totally separate and distinct acts are charged. The same proof would not necessarily establish these separate charges. A conspiracy to set up an unregistered still could be proved without presentation of evidence of the conspiracy to manufacture mash, and vice versa. This is true as to a conspiracy to operate a still without giving bond, and unlawfully to possess unstamped containers of liquor. Certain entirely distinct elements are required to establish the conspiracy described in each count, and hence four distinct offenses are charged. *Yenkichi Ito v. United States, 64 Fed. (2d) 73, 77 (C. C. A. 9); Parmenter v. United States, 2 Fed. (2d) 945 (C. C. A. 6); King v. United States, 31 Fed. (2d) 17 (C. C. A. 9); Leonard v. United States, 18 Fed. (2d) 208, 213 (C. C. A. 6); Pollock v. United States, 35 Fed. (2d) 174, 175 (C. C. A. 4); Piquett v. United States, 81 Fed. (2d) 75, 79 (C. C. A. 7); Slade v. United States, 85 Fed. (2d) 786 (C. C. A. 10); Chrysler v. Zerbst, 81 Fed. (2d) 975 (C. C. A. 10); United States v. Wexler, 79 Fed. (2d) 526, 528 (C. C. A. 2).* It is significant that different overt acts were charged under each of the four counts of indictment. *Piquett v. United States, supra.* The District Court did not err in imposing separate fines and requiring that the sentences upon all four counts run consecutively. The offenses were separate, and no double punishment exists."

II. Reason Relied On For Allowance Of the Writ.

1. That the Circuit Court of Appeals rendered a decision in conflict with the decisions of another Circuit Court of Appeals in the same matter.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court.

3. That the Circuit Court of Appeals had decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

4. That the Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be settled by this court.

Prayer For Writ.

Wherefore, your petitioners, Harry Fleisher, Sam Fleisher and Joseph Stein, jointly and separately, pray that a writ of certiorari issue under the seal of this court directed to the United States Circuit Court of Appeals for the Sixth Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record of the proceedings of said court had in these cases numbered 7383, Harry Fleisher, Appellant, v. United States of America, Appellee; 7384, Sam Fleisher, Appellant, v. United States of America, Appellee; 7385, Joseph Stein versus United States of America, Appellee; to the

end that these causes may be reviewed and determined by this Court and that the judgment of said Circuit Court of Appeals be reversed and for such further relief as to this Court may seem proper.

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UNITED STATES OF AMERICA.

BRIEF ON BEHALF OF HARRY FLEISHER, SAM FLEISHER AND JOSEPH STEIN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I.

Opinion Of Court Below.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (43), has not been recorded.

II.

Jurisdiction.

1. Judgment of the United States Circuit Court of Appeals, a review of which is hereby sought, was entered June 3, A. D. 1937 (43).

2. The statutory provision which is relied upon to sustain the jurisdiction of this court is Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.) and the Fifth and Eighth Amendments to the Constitution of the United States.

III.

Statement Of the Case.

The statement in the Petition for Writ of Certiorari, under I, pages 1-5, is hereby adopted and made a part of this brief without further elaboration.

IV.

Specification Of Error.

Petitioners intend to urge and rely upon the errors assigned in their Assignment of Errors in the District

Court (36-37), a succinct analysis of which is: That the court erred in sentencing the defendants to serve consecutively four sentences based upon the four counts of the indictment, all of which four counts constitute but one conspiracy and one crime, and that the sentences thus imposed were in contravention of the Constitution of the United States and especially of the cruel and unusual punishment clause thereof contained in the Eighth Amendment to the United States Constitution and of the Fifth Amendment, constituting double jeopardy and violation of the due process clause thereof.

V.

ARGUMENT.

Point I.

That the Circuit Court of Appeals rendered a decision in conflict with the decision of another Circuit Court of Appeals in the same matter.

Count Three of the indictment (5) charges the petitioners in this proceeding, together with others, with conspiring to carry on the business of distillers without having given bond as required by law. The Petition for Writ of Certiorari to review the proceedings of the court below is based upon the contention that Count Three contains as component elements Counts One, Two and Four (1-8); it being contended that the business of a distiller includes the setting up of a still, the making of mash, and the business of distilling spirits.

> *Tritico v. United States, 4 Fed. (2d) 664 (C. C. A. 5).*

In *Morgan v. United States, 294 Fed. 182 (C. C. A. 4)*, the court said, on page 184:

> "Conviction of the defendant on the charge of manufacturing moonshine whisky, under the facts of this case, necessarily embraced conviction of the offense of having in possession the same moonshine whisky, and the offense of having in possession property designated for the manufacture of moonshine whisky, charged in counts one and two of the same

indictment. The act charged as a crime in count three included acts charged as crimes in counts one and two. It follows that the sentence under counts one and two must be set aside, as was properly conceded by the United States Attorney * * *."

Woods v. United States, 26 Fed. (2d) 63 (C. C. A. 8);

Murphy v. United States, 285 Fed. 801 (C. C. A. 7);

United States v. Mozzochi, 75 Fed. (2d) 497 (C. C. A. 2).

It is obvious from a reading of the indictment (1-8) that the Government's theory in the trial court was that the four counts constituted but one conspiracy, otherwise irrelevant overts would not have been placed under several of the counts in the indictment.

Point II.

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with the applicable decisions of this court.

It has been repeatedly held by this court that where a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense. It is fundamental that the Government has not the right to split up a single transaction into a plurality of separate indictable and punishable offenses.

In re Nielson, 131 U. S. 176, 9 Sup. Ct. 672, 33 L. Ed. 118.

In re Snow, 120 U. S. 274, in which the court said:

> "It is to prevent such an infliction of penal laws, that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purpose of indictment or prosecution; prior to the time the prosecution is instituted."

Point III.

The Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

There is now doubt that the weight of authority applies the "same transaction test." It is equally true, however, that Federal courts have applied the same evidence test. It has been held in the Sixth Judicial Circuit, in which the rule is applied that the two offenses must be in substance precisely the same or of the same nature or of the same species, so that the evidence which proves the one would prove the other; or if this is not the case then the one crime must be an ingredient of the other.

It has thus been held that a defendant arrested under the National Prohibition Law could not be punished under each of two counts, one charging the manufacture and possession of intoxicating liquors, and the other the possession of implements and materials designed for manufacture of such liquor, where the manufacture was the dominant feature of the first count.

Reynolds v. United States, 280 Fed. 1 (C. C. A. 6);
Krench v. United States, 42 Fed. (2d) 354;

Sprague v. Aderholt-Warden, 45 Fed. (2d) 790;
Tritico v. United States, supra;
Morgan v. United States, supra;
Woods v. United States, supra;
Murphy v. United States, supra;
United States v. Mozzochi, supra;
In re Nielson, supra;
In re Snow, supra.

Point IV.

That the Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be settled by this court.

Petitioners respectfully contend that they do not believe that there is a case which has been decided in the United States Supreme Court in which the specific question of conspiracy has been considered with relation to the question of excessive punishment herein involved. It is true that in the Eighth Circuit Court of Appeals it has been held that the conspiracy to forge constituted a different and separate count from the conspiracy to utter, as was held in *Beddow v. Unied States, 70 Fed. (2d) 674 (C. C. A. 8)*, but the analogy of that case does not touch the facts in the case at bar. It is contended that had there been two conspiracy indictments, one to illegally distill and manufacture liquor, and two, a conspiracy to sell the liquor, there might be some basis for the analogy. This, however, does not apply to the case at bar for the reason that the illicit distilling of liquor contains as ingredients or component elements the other three counts. The same is true of *Parmenter v. United States, 2 Fed. (2d) 945.*

The maximum sentence that could be imposed in this case is set out in *18 U. S. C. A., Sec. 88:*

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand ($10,000.00) dollars, or imprisoned not more than two years, or both."

CONCLUSION.

We respectfully urge that the sentences of the petitioners are excessive and that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari, and thereafter reviewing and reversing the decision of the United States Circuit Court of Appeals for the Sixth Judicial Circuit.

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